

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

DAVID PEREZ,  
Appellant,

v.

UNITED STATES POSTAL SERVICE,  
Agency.

DOCKET NUMBER  
SF07529010067

DATE: MAY 30 1991

Alvin Gant, San Francisco, California, for the appellant.

Margaret A. Allen, Oakland, California, for the agency.

BEFORE

Daniel R. Levinson, Chairman  
Antonio C. Amador, Vice Chairman  
Jessica L. Parks, Member

OPINION AND ORDER

After full consideration, the Board DENIES the appellant's petition for review of the initial decision issued on January 26, 1990, because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. The Board REOPENS this appeal on its own motion, however, and AFFIRMS the initial decision as MODIFIED. The removal penalty is MITIGATED to a 90-day suspension.

BACKGROUND

The appellant, a mailhandler at the agency's Oakland, California facility, was removed for "falsification of time

records/leaving the building without permission while officially on the clock." See Notice of Charges-Proposed Removal, Appeal File, Tab 4e. The details of the charge are that on Sunday evening, July 16, 1989, the appellant punched in and then left the facility for the remainder of his shift. He returned only to clock in and out for breaks and at the end of the shift. The appellant admitted to the conduct as charged in the agency's Notice of Proposed Removal, but argued in his petition for appeal that the penalty was overly harsh. The administrative judge sustained the penalty, noting the seriousness of the appellant's misconduct.

In his petition for review, the appellant asserts that his representation at the hearing was inadequate, that the deciding official conducted biased interviews while investigating his case, and that he provided self-incriminating evidence. The petition for review also contains a copy of a letter approximately 29 of the appellant's co-workers sent to the deciding official indicating that they considered the appellant to be honest, well respected, and hard working. The letter requested that the appellant be reinstated.

#### ANALYSIS

The contention of inadequate representation is not grounds for Board review. See *Sofio v. Internal Revenue Service*, 7 M.S.P.R. 667, 670 (1981). Similarly, the appellant's contention that the deciding official conducted biased interviews is not grounds for Board review since it is

lacking in specificity and the appellant had an opportunity to cross examine the deciding official at the hearing. The fact that the appellant provided self-incriminating information is also not grounds for review. He does not deny his statements, and an admission that is not explained, rebutted, or contradicted may properly be considered. See *Garibay v. Veterans Administration*, 35 M.S.P.R. 327, 333 (1987), *aff'd*, 847 F.2d. 842 (Fed. Cir. 1988) (Table). Thus, the appellant's petition for review contains no arguments on which Board review may be granted.

We reopen the case on our own motion, however, to address the reasonableness of the penalty. While the Board will not freely substitute its judgment for that of the agency, the penalty selected by the agency must be within the tolerable limits of reasonableness. See *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). Falsification of time records is a serious offense which has been held to constitute cause for removal. *Rohn v. Department of the Army*, 30 M.S.P.R. 157 (1986) (sustaining the removal of an employee who submitted false time cards for six days); but see *McAllister v. United States Postal Service*, 42 M.S.P.R. 658 (1989) (mitigating to a demotion the removal of a postmaster for falsifying his own and two employees' time cards). Nevertheless, whether a particular falsification offense warrants removal must be determined in light of the circumstances of each case. See *Cade v. United States Postal Service*, 8 M.S.P.R. 717 (1981).

In *Douglas*, 5 M.S.P.R. at 305, the Board articulated a number of factors to be considered in determining the appropriateness of a penalty. While the Board recognized that not every factor would be pertinent in every case, the factors serve as a guideline for determining the penalty for a particular act of misconduct.

Although the appellant intentionally falsified his time card for personal gain, the appellant was not in a supervisory position. Cf. *Pitts v. Department of the Air Force*, 29 M.S.P.R. 108, 110 (1985) (sustaining the removal of a supervisor for falsifying inventory reports), *aff'd*, 795 F.2d 1020 (Fed. Cir. 1986) (Table). Nor did the appellant's position involve any fiduciary duty over time cards, cf. *Watson v. Department of the Air Force*, 34 M.S.P.R. 656, 663 (1987) (sustaining a removal where a timekeeper falsified her time and attendance for at least three years), *appeal dismissed*, 884 F.2d 1397 (1989) (Table); and his misconduct was unrelated to the safe keeping of the mails. The appellant's position also did not require that he work independently and away from supervisory control. Cf. *Sherwin v. Department of the Air Force*, 44 M.S.P.R. 144 (1990) (sustaining the removal for falsification of an employee who worked 200 miles from his immediate supervisor); *Rodgers v. Department of Labor*, 8 M.S.P.R. 257 (1981) (sustaining the removal of a mine inspector for falsifying weekly reports). Furthermore, the appellant's position as a mailhandler involved little or no public contact, and the agency has

produced no evidence to suggest any unfavorable publicity. *Cf. Connett v. Department of the Navy*, 31 M.S.P.R. 322, 328 (1986) (sustaining the removal of an employee for falsification and conflict of interest where the public trust was violated), *aff'd*, 824 F.2d 978 (Fed. Cir. 1987) (Table). In light of these factors, we do not find compelling the deciding official's testimony that he could no longer trust the appellant since the agency's mission involves the sanctity of the mails.

In addition, while the appellant was clearly aware that his actions were wrong, he admitted his misconduct and has indicated remorse. The appellant has nearly five years of service with the agency, had no prior disciplinary actions of record, and as indicated by the letter from his co-workers, was well regarded by them. The appellant also indicated that the reason for his misconduct was the stress of a family problem that is no longer a factor. See *Douglas*, 5 M.S.P.R. at 305. Further, the misconduct was the act of a single day and was not part of a repeated course of conduct. Finally, the agency indicated that one purpose for its decision to remove the appellant was to deter other employees. The Board has held, however, that exemplary punishment is generally contrary to the *Douglas* principles, which focus on the individual circumstances and offenses of the employee being disciplined. *Fowler v. United States Postal Service*, 32 M.S.P.R. 559, 563 (1987), *rev'd on other grounds*, 846 F.2d 77 (1988) (Table). Although falsification is among a long list

of infractions for which the agency has indicated it might impose disciplinary action, including removal, Agency File at Tab G, removal is not mandated by this policy statement.

For the reasons set forth above we find that a 90-day suspension is the maximum reasonable penalty for the appellant's misconduct.

#### ORDER

This is the final order of the Merit Systems Protection Board in this appeal. See 5 C.F.R. § 1201.113(c).

We ORDER the agency to cancel the appellant's removal and to replace it with a 90-day suspension retroactive to the date of the improper removal. This action must be accomplished within 20 days of the date of this decision.

We also ORDER the agency to issue a check to the appellant for the appropriate amount of back pay, interest on back pay, and other benefits under Postal Service regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to compute the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it comply. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to issue a check to the appellant for the undisputed amount no later than 60 calendar days after the date of this decision.

We further ORDER the agency to inform the appellant in writing of all actions taken to comply with the Board's Order

and of the date on which the agency believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

Within 30 days of the agency's notification of compliance, the appellant may file a petition for enforcement with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why the appellant believes that there is insufficient compliance, and should include the dates and results of any communications with the agency about compliance.


NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals  
for the Federal Circuit  
717 Madison Place, N.W.  
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

  
Robert E. Taylor  
Clerk of the Board

Washington, D.C.